

Amelia, without salvage is ordered, ought to be reversed, and that the Amelia and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the nett value, after deducting therefrom the charges which have been incurred.

TALBOT  
v.  
SEEMAN.

GEORGE WILSON v. RICHARD MASON,

DEVISEE OF GEORGE MASON,

AND

RICHARD MASON, DEVISEE OF GEORGE MASON,

v.

GEORGE WILSON,

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Waste and un-  
appropriated  
lands in Ken-  
tucky, in the  
year 1780,  
could not be  
lawfully appro-  
priated by sur-  
vey alone, with-  
out a previous  
legal entry in  
the book of en-  
tries.

THESE were writs of error to the district court of the United States, for the district of Kentucky, upon cross caveats for the same tract of land.

The caveat of Wilson v. Mason originated in the supreme court for the district of Kentucky in 1785, while Kentucky was a part of the commonwealth of Virginia, and the record states, "that heretofore, viz. at a supreme court for the district of Kentucky, held at Danville in the said district, in the month of March, 1785, came George Wilson and caused a certain caveat to be entered against George Mason, which is in the following words, viz. "Let no grant issue to George Mason, of Fairfax county, for 8,300 acres of land, in Jefferson county, surveyed on the south side of Panther creek, adjoining another survey of the said Mason's, of 8,400 acres, on the upper side; because the said George Mason has surveyed the same contrary to his location, for which cause, and also on account of the vagueness of the entry, George Wilson claims the same, or so much thereof, as interferes with his entry, made on treasury warrants for 40,926 acres, specially made on the 9th day of April, 1784. Entered 25th March, 1785."

A writ of error upon a caveat, lies from the district court of Kentucky district, to the supreme court of the United States.

Notice of an illegal act, will not make it valid.

A survey in Kentucky not founded on an entry, is a void act and constitutes no title whatever; and land so surveyed remains vacant, and liable to be appropriated by any person holding a land-warrant.

"Whereupon, at October term, 1785, a summons issued, commanding the sheriff of Fairfax county to summon George Mason to appear at the next March term, to shew cause why the 8,300 acres should not be

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"granted to George Wilson, or so much as interferes  
"with his entry for 40,926 acres, made on the 9th of  
"April, 1784."

Afterwards, and after Kentucky became a separate state, at a court held for the district of Bairdstown, in September, 1797, "to which court this suit had been removed, and the said George Mason having departed this life, the said suit was ordered to be revived in the name of Richard Mason, the devisee of George Mason deceased, who was devisee of George Mason deceased." Richard Mason then removed the cause from the state court to the district court of the United States, for the district of Kentucky, and it was agreed by the parties, "that the judgment in this caveat (Wilson v. Mason) if for the plaintiff, should be entered up as a judgment for the defendant in the caveat Mason v. Wilson: and if for the defendant, as a judgment for the plaintiff in the said caveat Mason v. Wilson, which suits are cross caveats between the parties for the same land." And thereupon came a jury, &c. who, being elected, tried and sworn *well and truly to enquire into such facts as may be material in this cause, and not agreed to by the parties,* found the special verdict herein after stated.

The cross caveat of Richard Mason v. Wilson was filed on the 13th of March, 1799, and seems to be in the nature of a plea or answer to the claim of Wilson: It is in the following form, viz. "Let no grant issue to George Wilson, or his assignees, on the said Wilson's survey of 30,000 acres of land lying in Jefferson county (now Nelson county) on the south side of Panther creek, a branch of Green river, made by virtue of an entry dated April the 9th, 1784, for 40,926 acres, upon the five following land-office treasury warrants, No. 17,639, 19,143, 19,614, 19,616, and 12,795. Richard Mason, infant heir and devisee of George Mason, junior, who was heir and devisee of George Mason, esquire, late of Fairfax county, Virginia, a citizen of the commonwealth of Virginia, by Cuthbert Banks, his next friend, enters a caveat against the same for the following causes:

"Because the said survey includes a tract of 8,300 acres which had been before located and entered by the

" said George Mafon in the year 1780, and which tract  
 " had been actually surveyed for him, the said George  
 " Mafon, and the certificate of survey thereof, dated  
 " October 2d, 1783, returned to the county surveyor's  
 " office long before the said George Wilfon made his said  
 " entry; and because the said entry, made by the said  
 " George Wilfon, on which his said survey is founded,  
 " was illegal and fraudulent, the said George Wilfon  
 " having knowingly and wilfully located his said entry  
 " upon lands which had been actually before appropriated  
 " and surveyed for others, as appears by the words of the  
 " said Wilfon's own entry, which begins at the upper  
 " and north-east corner of the said George Mafon's  
 " 8,400 acre survey, on the bank of Panther creek, up-  
 " on which survey of 8,400 acres, the adjacent survey  
 " made for George Mafon of 8,300 acres, made about the  
 " same time, binds, and runs thence south 10° east (be-  
 " ing the course to a single degree of the dividing line  
 " between the said Mafon's two tracts of 8,400 and  
 " 8,300 acres) passing the said Mafon's south-east corner  
 " 2,600 poles north, 80° east (which is the course to a  
 " single degree of the back line of George Mafon's said  
 " survey of his tract of 8,300 acres) 3,200 poles, and off  
 " at right angles, northwardly to the bank of Panther  
 " creek; and down the same, according to the meanders  
 " thereof, to the beginning; whereby it includes the  
 " whole of Richard Mafon's said tract of 8,300 acres, as  
 " devisee as aforefaid of George Mafon, as well as some  
 " other lands which have been previously located and sur-  
 " veyed for other people; which above mentioned courses  
 " could not have been inserted in Wilfon's entry, in the  
 " manner they are, without his having been acquainted  
 " with the said surveys made by George Mafon before  
 " mentioned; the plats and certificates of which, were,  
 " at the time of Wilfon's said entry, in the county sur-  
 " veyor's office; and from which it is evident Wilfon  
 " gained the information by which he made his special  
 " entry." The original caveat of George Mafon v. Wil-  
 " fon was entered May 6th, 1785.

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Mafon's entries, in the book of entries, were as fol-  
 low, viz.

" 1780, April 29th, George Mafon enters 8,400 acres  
 " of land, to begin on Panther creek, on the east side

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“thereof, opposite to a beech on the west side, about  
“four miles *above* the mouth of the *west fork*, and to  
“run up and down the said creek, and eastwardly for  
“quantity.”

“1780, April 29th, George Mason enters 8,300 acres,  
“to begin at the upper corner of his 8,400 acre entry,  
“and to run up the creek, on the east side, and back for  
“quantity.”

“1780, October 27th, George Mason desires to make  
“his entry of 8,400 acres more special on Panther creek,  
“viz. to begin four miles above the forks of Panther  
“creek, where it mouths into Green river, on the east  
“side, running up and back for quantity.”

The tract of 8,400 acres was surveyed on 27th September, 1783, beginning four miles above the mouth of Panther creek, where it empties into Green river, and not four miles above the mouth of the west fork of Panther creek, as mentioned in his first entry. The mouth of Panther creek being more than twelve miles below the mouth of the west fork.

The tract of 8,300 acres was surveyed on the 2d of October, 1783, adjoining to the survey of 8,400 acres, *below* the mouth of the west fork, and not above, as it would have been if surveyed according to the entry of the 29th April, 1780.

George Wilson's entry is as follows, viz.

“1784, April 9th, George Wilson enters 40,926  
“acres upon five treasury warrants, No. 17,639, 19,143,  
“19,614, 19,616, 12,795, on the south side of Panther  
“creek, a branch of Green river, beginning at the upper  
“and north-east corner of George Mason's 8,400 acre  
“survey on the bank of Panther creek, which survey begins, perhaps, about three miles from the mouth of  
“the said creek and 320 poles upon a direct line above  
“the mouth of the first fork of the said creek from the  
“mouth, thence running south 10° east, passing the said  
“Mason's south-east corner 2,600 poles; thence north  
“80° east 3,200 poles; thence off at right angles, north-

“wardly, to the bank of Panther creek, and down the  
“fame, with the several meanders thereof, to the place  
“of beginning.”

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Upon four of those warrants, 30,000 acres were surveyed for Wilson on the 2d June, 1784, and located so as to comprehend the whole of Mason's survey of 8,300 acres.

The following facts were agreed to by the counsel for both parties, viz.

“1. We admit that Panther creek has been known  
“and called by that name, Panther creek, generally,  
“since the beginning of the year 1780, and is truly represented on the plat returned in this cause, and also  
“the forks thereof.

“2. That at the distance of twelve and one quarter  
“miles and thirty-six poles, on a direct line from its  
“mouth, the said creek divides itself into two forks, viz.  
“the fork marked, on the plat returned in this cause, as the  
“west fork of said creek; and the other, the fork marked  
“on the plat, Panther creek; and that from the size and  
“natural descriptions of these forks, they would be re-  
“marked and called such by strangers who should explore  
“the waters of that creek.

“3. That the said forks were generally known, and  
“called the forks of Panther creek, from the beginning  
“of the year 1780; and that they were notorious as  
“such, to all who had acquaintance with the waters in  
“that part of this country.

“4. That in the winter before the said entries were  
“made for said defendant, the said agent, Hancock Lee,  
“went down on Panther creek, and explored the country  
“thereabouts; and encamped thereabouts four or five  
“weeks for that purpose; and there were several others  
“in company with him, who all went on the business of  
“viewing the land in that quarter.

“5. That James Hord was the surveyor who surveyed  
“the said entries in September and October, 1783.

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" 6. That Hubbard Taylor was the special attorney of the defendant Mason, for the purpose of making his surveys on Panther creek, among which was the one now in controversy, and previous to making said surveys, the said Taylor made out a plat of Panther creek, up to the forks thereof, by actual survey, for the purpose of satisfying himself how the survey of the said defendant ought to be made; which plat he delivered to the said Hord, when he went to make the surveys of the said lands, for his instruction; and by the said plat the said Hord was instructed to make the surveys of the said defendant as they are now surveyed. The entries, alluded to in the 4th fact, are those found by the jury to have been made for the defendant, by Hancock Lee, at the same time with that of the land in controversy."

The verdict of the jury was as follows, *viz.*

" We of the jury do find the facts following for the plaintiff, excluding those agreed to by the attorneys,

" 1. That the said Hancock Lee, at the time he made the said entry for the said Mason, did also make the several other entries for him.

" 2. That the plats and certificates of survey lay three weeks in the office before they were recorded.

" 3. That at the time of making out and recording the plats of said surveys, William Mason was agent to the said George Mason, and came to this country for the express purpose of attending to his land business; and had power and instructions to re-survey any of the said Mason's entries, which he should find to have been erroneously surveyed, or interfering with better claims.

" 4. That it was a general practice in the offices of surveyors, when a survey was found to have been made erroneously, to make the same over again at the request of the parties concerned; and the said practice prevailed also in cases of surveys recorded.

" 5. That when William Mason came to the surveyor's office to take out the plats in this case, and also those in

" the other cases in which George Mason was concerned,  
 " the surveyor told him that the entries of the said George,  
 " the defendant, had been surveyed wrong; and took a  
 " pen and paper and explained to him the calls of the en-  
 " tries, and by comparing them with the surveys, shewed  
 " him that they were erroneous; and offered to send a  
 " deputy with him, without further or additional ex-  
 " pence, to make the surveys aright, with which propofal  
 " the said William seemed pleased, and proceeded no fur-  
 " ther in the business at that time; but went away and  
 " after some days came back to the said office, and told  
 " the surveyor, that the entries of said Mason were so  
 " made that they would clash with each other, if survey-  
 " ed otherwise than they then were; and he did not see  
 " that the surveys could be amended: whereupon, he  
 " took out the plats and certificates of survey to return  
 " them to the register's office, and actually did so; which  
 " transaction happened at the office of the surveyor, about  
 " the 12th of September, 1784.

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" 6. That the lands, generally, over all the state of  
 " Kentucky, except the land reserved by law for entries,  
 " are involved in disputes, by different entries and sur-  
 " veys having been made for the same tracts.

" 7. That it was usual for the surveyors to survey en-  
 " tries agreeable to the directions of the proprietors or  
 " their agents, when such directions were given.

" 8. That a law, passed by the assembly of Kentucky  
 " in 1792, prohibited any further entry of land with the  
 " surveyors, and that ever since that time no land could  
 " be appropriated by virtue of land warrants.

" 9. That the practice of entering for land was a ge-  
 " neral strife for the best legal entry.

" 10. That George Mason's entry of 8,400 acres, made  
 " the 17th day of October, 1780, is surveyed on Panther  
 " creek, and a large branch thereof; and not on either  
 " of the main forks of said creek, as appears by the plat;  
 " and that the survey of 8,300 acres, being the land in  
 " controversy, adjoining the last mentioned survey, above,  
 " on said creek, and described in the plat in this cause by

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“ the letters and figures A. E. F. 8, is claimed; by the  
 “ defendant Mason, as a survey made by the said Mason,  
 “ on an entry of his, dated the 29th day of April, 1780,  
 “ for 8,300 acres of land; is on said creek and a branch  
 “ thereof, and not on either of the main forks, as ap-  
 “ pears by the plat.

“ 11. That the place designated, in the corrected plat,  
 “ by the letter A, on the south side of Panther creek, is  
 “ the place called for, by the plaintiff, as the beginning  
 “ corner of his entry of 40,926 acres, and described  
 “ agreeable to the plat.

“ 12. That it was a practice, in the office of William  
 “ May, surveyor of Jefferson, with whom the defendant  
 “ Mason's entries were made, and by whose deputy sur-  
 “ veyor, James Hord, the defendant's surveys were made,  
 “ to alter surveys discovered to be erroneous or wrong,  
 “ after they were recorded, and survey them aright, with-  
 “ out further or additional expence to the owners of such  
 “ entries, and to proceed on the plats of the amended  
 “ surveys, as the proper plats of the legal survey.

“ 13. That the said Hord, when on his way to make  
 “ said surveys, called on said surveyor of Jefferson, for  
 “ copies of the defendant's entries, and on seeing them  
 “ was struck with the variance between the calls of the  
 “ entries and his instructions, in point of location, and  
 “ on that account did not return the plats of the said sur-  
 “ veys, until he had seen Hubbard Taylor, and shewed  
 “ them to him, and represented his opinion of such vari-  
 “ ance; but on their being shewn to the said Taylor, he  
 “ directed said surveys to be returned as they were then  
 “ made.

“ 14. That the said Hord was fully informed of the  
 “ forks of Panther creek, when he was making said de-  
 “ fendant's surveys, and saw the same, and about the  
 “ same time at which he made the defendant's said sur-  
 “ veys, and before he returned from doing the same.”

(Signed) “ Daniel Weisiger, foreman.”

“ We of the jury do find the following facts for the  
 “ defendant Mason.



" 1. That the entry made in the name of George Wil-  
 " fon, April 9th, 1784, of 40,926 acres, on the south  
 " side of Panther creek, claiming under which, the said  
 " Wilfon entered this caveat, although made in his name,  
 " was made for the benefit of Christopher Greenup, and  
 " John Handley, as well as for his benefit, and that the said  
 " Greenup and Handley were, at the time of making the  
 " entry, and long since, partners with him in the same.

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" 2. That John Handley, then a deputy surveyor of  
 " the county, made the said entry of 40,926 acres, for  
 " himself and the other partners; and before he made  
 " the same, had obtained information of the surveys  
 " made for George Mason, on his entries of 8,300, and  
 " 8,400 acres, on the south side of Panther creek, from  
 " the surveys then in the office of the surveyor.

" 3. That the said George Wilfon, Christopher Green-  
 " up, and John Handley, had before, and at the time the  
 " said entry of 40,926 acres, was made, notice of the  
 " place where, and the manner in which, the surveys  
 " had been made for George Mason, on his entries of  
 " 8,300 acres, and 8,400 acres, on the south side of Pan-  
 " ther creek.

" 4. That John Handley, before the said entry of 40,  
 " 926 acres was made, had notice that the land, now in  
 " dispute in this caveat, had been included in Mason's  
 " survey, on his entry of 8,300 acres.

" 5. That the surveys, made for the said Mason, on  
 " his entries of 8,400, and 8,300 acres, on the south side,  
 " of Panther creek, were returned to the office of the  
 " surveyor of the county, in the course of the fall, 1783.

(Signed) " Daniel Weisger, foreman."

The judgment of the district court of the United States,  
 for the district of Kentucky, at June term 1800, in the  
 caveat of *Wilson v. Mason*, was, " That the defendant  
 " hath the better right to the land in controversy; It is  
 " therefore ordered that the caveat be dismissed, and that  
 " the defendant recover against the plaintiff his costs in  
 " this behalf expended."

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In the caveat of *Mason v. Wilson*, the judgment was,  
“ That the plaintiff recover against the defendant so much  
“ of the land in controversy as is included within the sur-  
“ vey of 8,300 acres, made by George Mason, on his en-  
“ try of 8,300 acres, entered *March* (Qu. April) the 29th  
“ 1780, and designated in the corrected plat returned in  
“ the said other caveat, by the letters D. E. F. 8, and  
“ also his costs by him about his suit in this behalf ex-  
“ pended.”

After these judgments were entered, Wilson, by his counsel, moved the court for a citation on a writ of error to the supreme court of the United States, to which Mason, by his counsel, objected, alledging that by the acts of assembly of Virginia, under which the plaintiff Wilson claims, it is provided that no appeal or writ of error shall be allowed on a judgment entered on a caveat, and that, therefore, in this case the plaintiff was precluded from claiming the benefit of a writ of error. But the court over-ruled this objection and granted the citation, to which opinion the defendant excepted.\*

\* The following is the opinion of judge Innes, who tried the cause in the district court; and which is alluded to in the subsequent arguments of counsel. After stating the facts of the case he proceeds “ The novelty of this case, the number of facts submitted and found by the jury, as well as the ingenious manner in which it was argued by the counsel of both plaintiff and defendant, have attracted my particular attention, and induced me to weigh the subject deliberately; the result of my deliberations will appear from the following opinion:

“ The first question which presents itself in this cause is, whether Mason has surveyed 8,300 acres of land contrary to his entry made the 29th of April, 1780.

“ The alteration of Mason on the 27th day of October, 1780, to the entry of 8,400 acres, dated the 29th day of April preceding, is considered as a withdrawing of, and a total abandonment of the first entry.

“ The *first* entry calling to lie about four miles above the mouth of the west fork, the *second* four miles from the mouth of the main creek.

“ The survey, therefore, of the 8,300 acres is made contrary to the entry, as it adjoins the tract of 8,400, which is made in conformity to the new entry.

“ This decision, that the land in question is surveyed contrary to entry, brings me to the principal question in this cause; will Mason’s survey for 8,300 acres of land, made contrary to his entry, secure the land to him against the claim of Wilson, founded on a special entry, subsequent to the recording of Mason’s survey, Wilson having, before he made his entry, notice of the place where, and manner in which, Mason had surveyed, and of the survey being recorded?

“ The parties to this suit are both considered as purchasers of the commonwealth; *Chancery revision of the laws*, p. 95, 96, §. 3. the sur-  
“ veyor

This cause was argued at last term by Daveiss and C. Lee for the plaintiff in error, and Jones and Mason for defendant.

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" surveyor of the county, as her ministerial agent; who is authorized to receive warrants for land, make entries, survey the same, receive the surveys when made, record the plat and certificate within three months after it is returned to his office, provided, upon examination, he finds it *truly* made and legally proportioned as to length and breadth.

" I will here take notice of two arguments, urged by the plaintiff's counsel, viz that the word "*truly*," used in the law, when speaking of the duties of the surveyor, referred to a power over the entry; that it was his duty to see that the entry and survey agreed.

" This would be a dangerous construction of the law, as it would authorize the surveyor to determine the rights of claimants, and to judge in his own cause where a survey should be made that interfered with a claim of his. I conceive him ministerial, except in two cases; he is to examine the plat that it is *truly* made; i. e. to see that the courses of the survey are truly laid down, and that it contains its complement of acres. It is to this part of his duty that the word *truly* refers. Again, he is to examine the legal proportion of the plat. In these two cases he acts judiciously; and it is right he should be vested with such a power; because, as he acts generally by deputy, it enables him to correct the work of his deputy, and also to prevent improper combinations between the employer and deputy.

" The second argument alluded to is this; that neither the entry-book, or book for entering surveys, are record-books; and that legislative interference was necessary to constitute them such, *ch. rev.* 96, 220. They are books directed to be procured by law. The surveyor is a sworn officer, commissioned agreeably to law. Copies of entries and copies of surveys, attested by him, are good evidence in a court of justice. I therefore consider every entry, and every survey, entered in these books as being of record, and equally valid with those which are usually filed records.

" Mason, a purchaser of the commonwealth, having surveyed contrary to his entry, returns the survey to the surveyor's office, where it is examined and recorded before the claim of any other person appears to the land. Can the commonwealth destroy Mason's survey and refuse her grant to the land?

" The law has pointed out no mode by which the commonwealth can set aside Mason's survey for her own benefit; neither was such a provision necessary; because he had paid the purchase-money, for so many acres of unappropriated land. It was vacant; and so soon as his survey was recorded, his *warrant* was carried into *full execution*, and the entry of 8,300 acres became vacant, and reverted to the commonwealth, there being no warrant in the surveyor's office to cover it, the warrant being returned to the owner with the plat and certificate of survey. Or, being recorded is the same thing in effect, as it can never be again acted upon, *being executed by actual survey*. *Ch. rev.* §. 3. p. 95, 96. Any practice to the contrary I deem illegal and contrary to law.

" From this statement of facts I determine Mason's right to be good against the commonwealth.

" As the commonwealth can take no advantage of Mason's surveying contrary to entry, shall Wilson, by his subsequent special entry, when he had full and perfect knowledge of the place where Mason's survey was made, and of its being recorded.

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*Daveis for plaintiff in error.*

As the counsel for the defendant in error have objected to our right of appeal in this cause, I shall at first confine myself to that point; because, if the court should agree

"There are only two ways of destroying a man's right to a tract of land By caveat after survey and before the title is complete; or, by a suit in chancery after the grant has issued.

"In the present case Wilson has chosen to enter a caveat to prevent the emanation of a grant to Mason; alledging that Mason has surveyed contrary to entry, and that it is vague, for which reason he claims the land by virtue of a special entry.

"There are four causes stated in the land-law which authorize the entering of a caveat. 1. Failing to register the plat and certificate of survey within twelve months after making the survey: 2. If the breadth of the plat be not one-third of its length: 3. If any person shall obtain a survey of land to which another hath by law a better right, the person having such better right may in like manner enter a caveat, &c. 4. If the plaintiff in a caveat recover judgment and fails to deliver the same, &c. into the land-office within six months after judgment, it shall be lawful for any person to enter a caveat, &c. The two first and fourth causes are penalties which any person may take advantage of, and do not apply to the present case. The third requires an existing right in the caveator at or before the time the survey caveated is recorded.

"From an attentive consideration of this passage in the law, it conveys to me this idea: "*Shall obtain a survey of lands,*" means subsequent to the passing of the law, and after the survey is recorded; and not from the making, because the survey is not complete until it is recorded; neither could he "*obtain*" it till the surveyor has performed that part of his duty, after which it is to be delivered to the proprietor with the warrant. Previous to the recording I consider the survey to be under the direction of the owner, and that he may make any alteration he pleases in it, but not after; although a different practice has prevailed, and which upon enquiry will be found to be contrary to law.

"It is important to this cause to consider another passage in the same sentence of the law; "*to which another hath by law a better right.*" The word *hath* is in the present tense, and refers to the time of obtaining the survey. If any construction relative to the word *obtain*, be right, the claim of the caveator must exist before or at the time of recording the survey. I am confirmed in the propriety of this interpretation of the law, for the following reasons: If a deputy surveyor makes a survey, the principal ought not to sign it till it is recorded; then the signature makes it ready to be delivered. If made by the principal, he will not deliver it before it is recorded. The survey cannot be considered as complete till all the requisites of the law be performed; the party is then entitled to it. Neither will the register of the land-office receive it without that formality. Without these requisites it is of no more value than waste paper; it cannot therefore be said to be "*obtained,*" without their being performed.

"The two first and fourth causes which justify the entering a caveat, I have already said, do not apply to the present case.

"It remains to be considered whether Wilson has pursued the statute so as to bring his case within the third cause: Had he "*a better right*" to

with them in opinion on that question, much time will be saved and much useless discussion prevented. It is contended that by the laws of Virginia, upon which the title to the land in dispute depends, and which give the re-

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"the land surveyed for Mason, and for which he has instituted this suit, than Mason had, at the time the survey was recorded?"

"A caveat is a new and summary mode of proceeding, in derogation of the proceedings at common law, instituted by statute; it is necessary, therefore, to pursue the statute strictly, and shew to the court that the caveator has a clear right to pursue that mode of proceeding. 1 D. and F. 141."

"Wilson's entry was made on the 9th day of April, 1784. To the date of his entry I fix the commencement of his claim to the land in controversy, it being the first certain and evident act of ownership manifested by him; which is upwards of four months after Mason's survey had been recorded."

"As Wilson's right did not exist at the time Mason's survey was recorded, he has failed to prove the *better right* required by law; neither has he pursued the statute by assigning proper causes for caveat. Surveying contrary to entry, or making a vague entry, are not stated in the law as exceptions to a survey, or causes for entering a caveat."

"True it is, that there are instances in which surveying contrary to entry would be a good cause of caveat. But this is where there is an existing right before the survey is made or obtained; and the question would then rest on having the *better right* to the land."

"The favourable light in which surveys have been viewed by the legislature is apparent in all the laws which have been enacted respecting the titles to land. They are all to be considered as one law, forming one general system on the same subject."

"The surveys here alluded to were injurious to the interest of the commonwealth, but being made by the proper officer, were confirmed."

"In this case the commonwealth is not injured, and Wilson, through his partner Handy, had every information necessary to guard him against an interference with Mason's survey."

"Considering the parties both as purchasers of the commonwealth, deriving their claims from the same source; Mason as the first, and Wilson as the second, the following principles will apply in this case respecting notice. Lord Hardwicke said, in the case of *Le Neve v. Le Neve*, Amb 446. 3 Atk. 654 "that the taking of a legal estate after notice of a *prior right*, makes a person *mala fide* purchaser, and is a species of fraud." If a person does not stop his hand, but gets the legal estate when he knew the right in equity was in another, he will be rebutted by this maxim "fraus et dolus nemini patrocinari debent."

"In the case of *Abney v. Kendall*, 1 eq. ca. ab. 330. pl. 1. 1 chan. ca. 38.† it was determined that if A having notice that lands were contracted to be sold to B purchases those lands, and takes a conveyance it shall destroy the purchase and the land shall be reconveyed to B."

"Mason being considered the first purchaser of the commonwealth having obtained his survey, through the means of her agent, (though contrary to entry, yet of which she can take no advantage, and which

"worked

\* "Many acts passed the Virginia legislature giving further time to return plats, &c."

† 1 Chan. ca. 38. *Merry v. Abney the father, Abney the son, and Kendall.*

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medy by caveat, no appeal or writ of error will lie. The land law of Virginia, as it is called, viz. the act of May 1779, (*Chancery revision of the laws of Virginia*, p. 94.) entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," which directs the manner of proceeding upon caveats, enacts that "the court" (that is the general court) "shall proceed to determine the right of the cause in a summary way, without pleadings in writing; empannelling and swearing a jury for the finding of such facts as are material to the cause, and are not agreed by the parties; and shall thereupon give judgment, *on which no appeal or writ of error shall be allowed.*"

This law, it is said, was in force at the time of the separation of Kentucky from Virginia; and that by the act of assembly of Virginia of December 1789, *rev. code* p. 56. sect. 7. which prescribes the terms upon which Kentucky might become an independent state after the 1st. of November 1791, it is provided that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure, under the laws of the proposed state, "*and shall be determined by the laws NOW existing in this STATE.*"

"worked no iniquity to any person, the land being vacant) by recording the survey, the entry *above* the forks of the creek was abandoned. Wilson having *notice*, before he made his entry, that Mason had appropriated the land by the recording of the survey, cannot support his claim under the statute; judgment, therefore, must be entered for the defendant.

"The preceding pages contain my opinion delivered in the caveat, George Wilson against Richard Mason, devisee, &c. at the June term, 1800, of the district court of the United States for the Kentucky district.

"As the principles on which the decision was founded will be brought before the supreme court of the United States, where I can have no opportunity of assigning my reasons in support of the judgment, with due deference I solicit the court to permit the opinion to be read; by which the principles which governed me in the decision will appear fully before that court which is to reverse or affirm the judgment I have given between the parties.

"This request is grounded upon this single consideration, that what I have been *officially* obliged to do, may be examined before a final enquiry is had respecting my judicial acts."

(Signed)

"HARRY INNES."

"May 18th, 1801."

But we shall contend,

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1st. That the jurisdiction and powers of this court do not depend upon the laws of Virginia, but upon the constitution of the United States, and the acts of congress.

2dly. That the laws of particular states lose their force when they contravene the acts of congress.

3dly. That by the law of Virginia a right of appeal is allowed upon a caveat.

1st. By the constitution of the United States, art. 3. sect. 2. "the judicial power shall extend" "to controversies between citizens of different states," and in all cases, except where a public minister, or a state, shall be a party, "the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make." Congress have not excepted the present case; it therefore follows, that by the constitution of the United States, this court has appellate jurisdiction of the cause.

2dly. By the constitution of the United States, art. 6. "This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges, in every state, shall be bound thereby, *any thing in the constitution or laws of any state to the contrary notwithstanding.*" By the 10th section of the judiciary act of 1789, the district court of Kentucky has jurisdiction of all cases by that act made originally cognizable by the circuit courts, and it is enacted that "writs of error and appeals, shall lie, from decisions therein, to the supreme court in the same causes, as from a circuit court to the supreme court and under the same regulations." This cause having been removed, by the defendant Mason, from the state court, into the district court of the United States for the district of Kentucky, under the 12th section of the judiciary act of 1789, is to "proceed in the same manner as if it had been brought there by original process." And by the 22d section, "final judgments and decrees in civil actions in a circuit court, brought there by original process, or removed there from courts of the several states,"

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where the matter in dispute exceeds 2000 dollars, may be re-examined and reversed or affirmed in the supreme court.

A cause may be removed into a circuit court from a supreme court of a state, from which, by the laws of the state, no appeal or writ of error would lie; and if the principle contended for by the opposite counsel is correct, it would equally prevent this court from taking cognizance of a writ of error in that case, as in this.

Besides, the question, whether a writ of error or appeal will, or will not, lie upon a caveat, does not affect the title to the land; and the act of assembly of Virginia of December, 1789, was only intended to protect the rights to land in Kentucky acquired under the laws of Virginia. It says, "*the rights and interests of lands shall be determined by the laws now existing,*" and does not say that Kentucky may not give a further *remedy*.

3dly. A right of appeal upon a caveat *did* exist in Virginia at the time of passing the act of assembly of December, 1789, ch. 53. respecting Kentucky. By the act of the Virginia assembly, October 1788, ch. 67. sect. 11 and 12. the cognizance of caveats was given to the district courts, and by the 16th section of the same act an appeal is allowed *as of right* in all cases. The act of December 12, 1792, sect. 6 and 9. rev. code, p. 80, 81. re-enacts those clauses of the act of 1788.

*Mason for defendant in error.*

It is not denied that the acts of congress are in many cases paramount to the laws of the individual states; but even a *general* position of that kind will not decide the present question. This action was brought in a state court, under a state law, before congress legislated upon the subject, and even before congress, or the constitution of the United States, had an existence. Can such an action be effected by subsequent acts of congress?

The law by which Kentucky was erected into a separate state passed the Virginia legislature in December, 1789. This is an unalterable law, embracing the citizens



of both states. It is a compact by which they mutually agreed that the rules of property should not be altered. If we admit that by the act of 1792, appeals were allowed in the case of caveats, the admission proves nothing in the present question, because the law of 1789 is an unalterable law, and confined to the then existing state of things. It was not in the power of one of the contracting parties to change the terms of the compact.

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But it is said that there was a right of appeal at the time of that compact. Let us examine the laws relative to this subject. The first act is that of 1779, mentioned by the opposite counsel, which declares that caveats shall be tried in the general court, and that there shall be no appeal or writ of error. The next is the act of 1788, which transfers the jurisdiction of the general court to district courts, and declares that "they shall have the *same* jurisdiction concerning" "caveats" "as the general court heretofore had by law." But the jurisdiction which the general court heretofore had by law was an *exclusive* and *final* jurisdiction, from which there could be no appeal. If then the district courts were to possess the *same* jurisdiction, it must be an *exclusive* and a *final* jurisdiction. But it is said that by the same act of 1788, an appeal in all cases from the district court was a matter of right. This must evidently mean in all cases where a right of appeal before existed from the general court to the court of appeals; but cannot be understood to give an appeal in a case where it had been *expressly* excluded by an existing law. The intention of the legislature was to put the district court, as to all cases arising within the district, exactly in the place of the general court, and to give them the same jurisdiction, to be exercised in the same manner, with the same limitations, and liable to appeals only in the same cases. But the act of 1788, erecting district courts on the *eastern* waters, did not affect Kentucky. The legislature had before, by an act passed in 1782, erected a court on the *western* waters, called the supreme court for the district of Kentucky, to which it had transferred all the powers and jurisdiction theretofore exercised by the general court of Virginia; and with the rest, the power to try caveats and to give judgment thereon, without *any appeal* or writ of error to their judgment. The act of 1788 did not take away the

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exclusive cognizance which the supreme court of the district of Kentucky had respecting caveats, but they retained it till the final separation of Kentucky from Virginia; after which the legislature of Kentucky passed no law authorizing an appeal; so that under the state laws, it is clear that no appeal or writ of error would lie. There being then no appeal under the state laws, the question will be simply whether a writ of error will lie to the district court of the United States for the Kentucky district, upon an action carried there from the state court, which, under the laws of the state, had a final and exclusive jurisdiction of the cause.

The 22d section of the judiciary act of 1789 (Laws of U. S. vol. 1. p. 61.) which allows appeals and writs of error generally, did not contemplate a case like the present. This court is bound to take notice of the laws of the several states. By the 34th section of the same judiciary act, p. 74, the laws of the several states are to be the rules of decision in cases where they apply. The remedy by caveat is given by the state law, and the party who chooses to take that remedy must take it with its condition annexed, that no appeal or writ of error shall be allowed. A purchaser under the commonwealth of Virginia acquires his right under this condition. It is a part of the contract from which this court cannot absolve him. The parties to this suit are not the only parties interested in this question; for while the right is hung *in dubio*, whilst it is uncertain to whom the grant ought to issue, the state taxes cannot be collected, the commonwealth having no tenant to whom to resort. Wilson has sought the summary process by caveat, and ought to be bound by the restrictions of that law under which he claims his remedy. He was not compelled to use the summary remedy, he might have resorted to chancery, and then the commonwealth would have had a tenant to pay the taxes. He ought not to have the benefits of this kind of process without submitting to the inconveniences which may be supposed to attend it. If this opinion is correct, although the laws of the United States provide generally that writs of error may be had, they can only give them as a remedy where a right exists; and if Wilson's right is gone by the judgment of the court below, he is precluded from suing it out, by the statute under which he claims.

Lee, in reply.

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This caveat is brought from the district court of the United States, and not from a state court. It is true that it originated in the state court, but it was the defendant Mason, and not Wilson the plaintiff, who brought it into the court of the United States; and if the judgment of that court becomes thereby liable to be reversed upon a writ of error, it is a consequence attributable to the act of Mason alone.

There is nothing peculiar in the nature of the proceeding by caveat, to exclude it from the general appellate jurisdiction which is given to this court by the constitution and laws of the United States. It is not true that this court are to look into the laws of Virginia for their right to correct the errors of the inferior courts of the United States. When a cause is brought from a state court into a court of the United States, it is to be proceeded upon as if it had originated in the latter court, and the act of congress has expressly provided for an appeal or writ of error in the very case of an action removed from a state court into an inferior court of the United States. Unless this case can be shewn to be within some express exception to the general rule, none ought to be presumed by implication. With regard to the compact between Virginia and the inhabitants of Kentucky, it is true that in all matters of substance, where the right of property depends upon it, it is binding upon this court; but in matters of form only, it could never receive the strict construction contended for, even between the parties themselves. The reasoning of the opposite counsel would go to prove that every caveat, depending upon the laws of Virginia, must be tried in the courts of Virginia only, because they had the sole right of trying a caveat, at the time of the compact. It would prevent the states of Virginia and Kentucky forever from modifying and regulating their system of courts, and neither state could ever afterwards authorize an appeal upon a caveat.

But an appellate jurisdiction on caveats did exist in Virginia at the time of the compact. It appears by the act of congress, vol. 1. p. 278, that Kentucky did not become an independent state till June, 1792. The county

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courts of Virginia had before that time cognizance of caveats as to lands within their respective counties. *Laws of Virginia, rev. code, p. 92, §. 11, and in p. 88, §. 53,* an appeal is given from the county courts to the district courts in all cases of a certain value, or where the title of land is drawn in question; and in *p. 69, §. 14,* an appeal or writ of error is allowed from the district courts to the court of appeals, in the same manner as from the county to the district courts.

As to taxes, the state may tax the land before any patent has issued, if they think proper. It is not necessary that there should be a tenant.

*The court directed the counsel to proceed in the further argument of the cause, observing that they would consider this point with the others.*

*Lee for the plaintiff in error.*

The question is who has the better right to the grant for 8,300 acres of land, surveyed for George Mason, on the 2d of October, 1783.

1st. The decision of this controversy depends on the laws of Virginia prescribing the terms and manner of acquiring title to waste and unappropriated lands; with which there must be a legal and exact compliance. (A) Ac-

(A.) The following is the substance of those parts of an act of assembly, which are material to this cause, contained in the chancery revision of the laws of Virginia, published in 1785, by order of the general assembly, p. 94, entitled "An act for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands," May session, 1779.

The preamble recites, "Whereas there are large quantities of waste and unappropriated lands within the territory of this commonwealth, the granting of which will encourage the migration of foreigners hither, promote population, increase the annual revenue, and create a fund for discharging the public debt, Be it enacted," &c.

§. 1. That an office be constituted for the purpose of granting lands, and a register of the said land-office be appointed, &c.

§. 2. "That any person may acquire title to so much waste and unappropriated lands as he or she shall desire to purchase, paying

According to these laws there must be a *warrant*, an *entry* and a *survey*; the warrant being the foundation of the entry, and the entry directing and controlling the survey. If the

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"on paying the consideration of £. 40 for every 100 acres, and so in proportion," &c.

§. 3. Register to grant printed warrants under his hand and seal of office, specifying the quantity of land, and the rights upon which it is due, authorizing any surveyor duly qualified according to law to lay off and survey the same, "which warrants shall be always good and valid until *executed by actual survey*:" no warrant to be issued other than pre-emption warrants, before 15th October, 1779. No surveyor to admit the entry or location of any warrant before 1st May, 1780. A surveyor to be appointed in every county.

"Every person having a land-warrant founded on any of the before mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands or the greater part of them lie, who shall give a receipt for the same, if required. *The party shall direct the location thereof so specially and precisely, as that others may be enabled with certainty to locate other warrants on the adjacent residuum; which location shall bear date on the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries.*"

"The surveyor at the time of making the survey shall see the same bounded plainly by marked trees, except where a water course or ancient marked line shall be the boundary, and shall make the breadth of each survey at least one-third of its length in every part, unless where such breadth shall be restrained on both sides by mountains unfit for cultivation, by water courses, or the bounds of lands before appropriated. He shall, as soon as it can conveniently be done, and within three months at farthest after making the survey, deliver to his employer, or his order, a fair and true plat and certificate of such survey, the quantity contained, the hundred (where hundreds are established in the county wherein it lies) the courses and descriptions of the several boundaries, natural and artificial, ancient and new, expressing the proper names of such natural boundaries, where they have any, and the name of every person whose former line is made a boundary; and also the nature of the warrant and rights on which such survey is made. The said plats and certificates shall be examined and tried by the said principal surveyor whether truly made and legally propor-

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entry be made without a warrant, or if the survey be made of other land than that described in the entry, in either case there is a defect of title.

“tioned as to length and breadth, and shall be entered  
“within three months at farthest after the survey is made, in  
“a book, well bound, to be provided by the court of his  
“county, at the county charge.”  
“Every person for whom any waste or unappropriated lands  
“shall be so located and laid off, shall, within twelve months  
“at farthest after the survey made, return the plat and cer-  
“tificate of the said survey into the land-office, together with  
“the warrant on which the lands were surveyed, and may de-  
“mand of the register a receipt for the same, and on failing  
“to make such return within twelve months as aforesaid, or  
“if the breadth of his plat be not one-third of its length, as  
“before directed, it shall be lawful for any other person to  
“enter a *caveat* in the said land-office against the issuing of  
“any grant to him, expressing therein for what cause the  
“grant should not issue; or if any person shall obtain a survey of  
“lands, to which another hath by law a better right, the person  
“having such better right, may in like manner enter a *caveat* to  
“prevent his obtaining a grant until the title can be deter-  
“mined; such *caveat* also expressing the nature of the right  
“on which the plaintiff therein claims the said land. The  
“person entering any *caveat* shall take from the register a cer-  
“tified copy thereof, which, within three days thereafter,  
“he shall deliver to the clerk of the general court, or such  
“*caveat* shall become void; the said clerk, on receiving the  
“same, shall enter it in a book, and thereupon issue a summons,  
“reciting the cause for which such *caveat* is entered, and re-  
“quiring the defendant to appear on the seventh day of the  
“succeeding court, and defend his right; and, on such process  
“being returned executed, the court shall proceed to determine  
“the right of the cause in a summary way, without pleadings  
“in writing; empanelling and swearing a jury for the find-  
“ing of such facts as are material to the cause, and are not agreed  
“by the parties; and shall thereupon give judgment, on which  
“no appeal or writ of error shall be allowed; a copy of such  
“judgment, if in favour of the defendant, being delivered  
“into the land-office, shall vacate the said *caveat*; and if not de-  
“livered within three months, a new *caveat* may for that cause  
“be entered against the grant; and if the said judgment be  
“in favour of the plaintiff, upon delivering the same into the  
“land-office, together with a plat and certificate of the sur-  
“vey, and also producing a legal certificate of new rights on  
“his own account, he shall be entitled to a grant thereof;  
“but on failing to make such return and produce such certifi-  
“cates within six months after judgment so rendered, it shall  
“be

In this caveat one of the causes assigned is, that the survey of Mafon was made contrary to his entry, and this we conceive to be a fatal defect in his title.

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2d. The entries made on the 29th of April, 1780, by G. Mafon (from whom the defendant derives his title) of his two warrants, No. 1, for 8,400 acres, and No. 2, for 8,300 acres, were valid and sufficient entries of land on the east side of Panther creek, and above the mouth of the west fork thereof, at the time those entries were made. The entry of warrant No. 1 is "on 8,400 acres of land to be gin on Panther creek on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity."

The entry of warrant No. 2, is "on 8,300 acres to be gin at the upper corner of his 8,400 acre entry, and run up the creek on the east side, and back for quantity."

3d. If the explanation made on the 27th of October, 1780, of the entry of warrant No. 1, on the 29th of April preceding, for 8,400 acres, was a subtraction thereof from the land to which it had been applied, a matter not clear of doubt, and therefore not admitted; yet the entry of warrant No. 2, upon 8,300 acres was not thereby af-

"be lawful for any other person to enter a caveat, for that cause, against issuing the grant; upon which subsequent caveats, such proceedings shall be had as are before directed in the case of an original caveat; and in any caveat where judgment shall be given for the defendant, the court shall award him his costs;" "and in case the plaintiff in any such caveat shall recover, the court may, if they think it reasonable, award costs against the defendant."

"And for preventing hasty and surreptitious grants, and avoiding controversies and expensive law suits, be it enacted, that no surveyor shall at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land, by him surveyed, except only to the person or persons for whom the same was surveyed; or to his, her or their order; unless a caveat shall have been entered against a grant to the person claiming under such survey, to be proved by an authentic certificate of such caveat from the clerk of the general court, produced to the surveyor."

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fectcd, but remained unaltered, unimpaired and unabstracted from the land which it describes with sufficient legal precision and certainty. The re-location of one warrant is not necessarily the re-location of another. If the warrant No. 1. was transferred by a new entry on the 27th of October, 1780, to land some miles *below* the west fork of Panther creek, yet the warrant No. 2. having been legally located, on the 29th of April antecedent, upon a tract of land some miles *above* the west fork, remained appropriated to that tract of land.

4th. The entry of 8,300 acres, under warrant No. 2, being such a special and precise entry as the law requires, is an appropriation of the land described in it; and fixes that warrant upon that tract of land, situate upwards of four miles *above* the west fork of Panther creek: and the *survey* made by Mason of 8,300 acres on the *south* side of Panther creek, and *below* the west fork thereof, and several miles below it, is not a survey of the same land contained in his entry.

A *survey*, of itself, without a previous legal entry of a land warrant, is not a *legal appropriation* of waste and vacant land; and therefore this survey, unsupported by a legal warrant and a legal entry, was no legal appropriation, by Mason, of the land in controversy; but an unlawful intrusion thereupon; and the same land remained open to the appropriation of others, who, having notice of the illegal survey of Mason, were not precluded by law, or equity, from proceeding in due course of law to obtain title to the same land which is described in that illegal survey which had been knowingly made by the agents of Mason contrary to his legal entry. No grant of the land, therefore, ought to be made to the defendant Mason.

5th. If the claim of the defendant be deemed invalid, then there is no impediment in the way of the plaintiff whose warrants, whose entry, and whose survey are perfectly conformed to law.

The two causes assigned by Mason in his caveat against Wilson are resolvable into one, viz. that having notice of the *survey* of Mason, it was not equitable but fraudulent



to acquire a title to the same land which was contained in that survey. But if the law be in favor of the plaintiff, equity is also : for notice of illegal proceedings in one man to acquire property, is no equitable bar to another who shall in all respects proceed according to law.

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On the part of the defendant Mason, there was full and complete knowledge of Green river, Panther creek, and the west fork ; and with this knowledge, a survey was made of a different tract than the one described and authorized by the entry No. 2, for the purpose of obtaining a grant, in evasion and fraud of the law. Such illegal proceeding ought not to be sustained in a court of justice against another who shall respect and obey the law in all particulars.

The entry of Mason for 8,300 acres, on the 29th April, 1780, begins at the upper corner of his entry for 8,400 acres, as made on the same day. The entry for 8,400 acres, well and accurately described a tract of land lying on the *east* side of Panther creek, opposite a beech on the west side, and *four miles above* the west fork. This entry being sufficiently certain, the entry for 8,300 acres, must be certain also, and describes a particular tract of land lying more than four miles *above* the west fork.

The west fork was known by that name to the agent of Mason at the time he made the entries on 29th April, having encamped thereabouts, four or five weeks in the winter and spring before he made the entries for Mason. It has always been known by that name since the first exploring of that part of the country. He was informed, while the surveys were still in his power, that they did not conform to his entries, and shewn the manner in which they differed, and yet he obstinately persisted in having them recorded. The warrant No. 2, then was well and sufficiently located on the land *above* the west fork, and a removal of the location of warrant No. 1, even if such removal could be made according to law, could not be considered as a removal also of the location of No. 2, without an express declaration to that effect. The location of warrant No. 1, was changed, but the location of No. 2, was not. Mason has surveyed it as if it was ; and hence results the fatal difference between

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his entry and his survey; by which his survey is a mere void act, and can not be the foundation of a claim to a patent.

But it may be said perhaps, that Mason's survey of 8,300 acres, although not authorized by a previous entry, yet being made before Wilson's entry, and Wilson having notice of it, was good against Wilson, as well as against the commonwealth. This is denied. As to the commonwealth it was an intrusion; and as to Wilson the land was still vacant, it not having been appropriated in the manner authorized by law. Before a grant for land has actually issued, the only record of appropriations is the surveyor's book of entries of locations. The book of surveys was not intended by the legislature as the book to resort to for information as to appropriations; it furnished no evidence of that kind. And as to notice, the principle is well established that notice of an illegal act, is no equitable bar to him who proceeds according to law. *Cowper* 280, *Chapman v. Emery*, and *Doe v. Routledge*, *Cowp.* 708, 711, 712, where lord Mansfield states the reason for the principle to be, "because if he knew the transaction, he knew it was void by law." 5 Co. 60, (b) *Gooch's case*. 1 Eq. ca. ab. 334. *Tonkins & Ennis*. 2. Eq. ca. ab. 682. *Powell and Pleydell*.

Notice could not make that act valid which was void at law. A survey is not the act of appropriation which the law requires. The land not being appropriated according to law, was such waste and unappropriated land as the act of assembly says any person may acquire a title to, on complying with the terms, and by taking the steps prescribed by the act, and Wilson or any other person might lawfully appropriate the land, by proceeding regularly according to law.

Mason, then, not having taken the steps required by the act of assembly had no title at law; and having illegally made his survey, with a full knowledge of all the circumstances, and after having been warned of his error, has certainly no right in equity. Before he obtained a grant, Wilson, by pursuing the steps of the law, acquired a better right, and was thereby intitled to bring his caveat, and obtain a judgment in his favor.

*Daveiss*, on the same side.

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Notice cannot alter the law, except where the law requires notice. Where a statute requires notice and prescribes the mode, notice in another mode is not sufficient. 4 Term. Rep. 368. *King v. Newcomb*. Amb. 444, 445.

This is a case in which Wilson and Mason are both contending *de damno evitando*. The jury have found that by a law passed by the assembly of Kentucky, in 1792, all further entries of land with the surveyors are prohibited, and that ever since no land could be appropriated by virtue of land warrants. Consequently the principle applies, which is laid down by lord Kaim, in his *principles of equity*, p. 26, 27, 162, 163, 199, "that it is a universal law of nature that it is lawful for one, *certains de damno evitando*, to take advantage of another's error." A warrant is a transitory chattel until it has been located according to law. The entry is the appropriation of a particular tract of land, and the fixing of the warrant to that tract. The survey is of no effect, unless it be a survey of the tract so appropriated. In support of these positions he cited a manuscript report of land cases decided in the courts of Kentucky, p. 2 and 3, *Swearingen v.*——— p. 35. *Dougherty v. Crow*—61, 62, 63, *Isaacs v. Willis*—268, *Owen v. Willson*—77, 78, 79. *Kite v. Stevenson*—182, 183. *Consella v. Briscoe*—199, *Swearingen v. same*—197, *Miller's heirs v. Fox*—200, *Smith v. Bradford*—206, 207. *Fry v. Effery*, and other cases in pages 211, 212, 214, 222, 232, 236, 268, 302, 303, 337, 338, 343, 353, 354.

It will probably be contended by the defendant, that the intention of the assembly in requiring an entry, was to give notice to subsequent purchasers; and that notice given or gained in any way is sufficient. But it has been shewn that here was no appropriation by Mason; and that the land until appropriated is waste. The land law shews this because nothing but a regular title is protected by that law. In a statute introducing a new law, or prescribing the mode of acquiring new rights; affirmative words imply a negative of all other modes of acquiring that right, or fulfilling the terms of that law. The land law by giving one way of acquiring titles, negatives all other modes. In 4 Bac. Ab. 641, it is said, "If an af-

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"firmative statute, which is introductive of any new law, "limits a thing to be done in one manner, it shall not, "even where there are no negative words, be done in "any other," and the following cases are there cited.—*Stradling v. Morgan*, *Plowd.* 206, (*b*)—*Slade v. Drake*, *Hobart*, 298. *Weihen v. Baldwin*, *Sid.* 56. He cited also, *Thornby v. Electwood*, *Strange*, 329, and 3 *P. Will.* 458, 459, 460, 461. *The King v. Burrage*. Where a certain mode is pointed out by a statute, in which a title may be obtained, a conformity to that mode is a condition precedent, without complying with which, no title can be obtained. In the present case a warrant, an entry, and a survey are conditions precedent, and a want of either is fatal.

*Lee.*

In the 10th fact, found by the jury, for the plaintiff, it is stated, the survey of 8,400 acres was made on the entry of 17th October, and that the survey of 8,300 acres was made on the entry of 29th of April. This must prevent the defendant from arguing that the latter survey was made on the entry of October, as well as from pretending that the entry of October applies to the entry of 8,300 acres made in April.

In order to prove that all lands, not entered for in a regular manner, were to be considered as *waste* and *unappropriated*, he cited the case of *Jones v. Williams*, 1 *Wash.* 231, in which the court call lands waste and unappropriated, although they had been settled and occupied for years.

*Mason, for defendant in error.*

1st. The entry of Maton, upon which his survey of 8,300 acres was made, is sufficiently certain, and the survey is in conformity to the entry.

2d. Admitting that the entry was vague, and not corresponding with the survey, yet Mason having paid for the land, and surveyed it, quoad the commonwealth, he was a *bonâ fide* purchaser, for a valuable consideration, and entitled to the land, provided no step had been taken

by any other person to acquire title to this land, previous to Mafon's survey.

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3d. Mafon having appropriated this land by a survey actually made, returned to the surveyor's office, and recorded, the land ceased to be waste and unappropriated land: And Wilson, having a perfect knowledge of these facts before and at the time he made his entry, was and is, (if he could acquire title at all) in the character of a second purchaser with notice of a prior sale of the same land, and therefore was a fraudulent purchaser.

4th. The plaintiff in error is not, under the provisions of the law, entitled to a caveat in this case, because the *better right*, which the law meant to protect, was a right existing before or at the time the survey to be caveated was made.

1st The entry of 8,300 acres is sufficiently certain, by its reference to the entry of 8,400 acres: The surveys of both entries are upon the identical tracts originally intended to be located. The first description of them in April, 1780, was inaccurate on account of the mistake in the names of places. The particular forks and branches had at that time scarcely acquired any names at all. The facts stated in this case do not admit that the names of the places were known before the *beginning* of the year 1780, which is the very time when the entries were made. It does not appear that the place now called the mouth of west fork was known by that name before Mafon made his entries. It may be a name since acquired, or given by the surveyor or his deputies, who are the persons that generally give names to places in new countries. So soon as the fall of the same year Mafon found that the description was not sufficiently accurate; and made an explanatory entry declaring what place he meant by the *mouth of the west fork*, and stating it to be *the forks of Panther creek where it mouths into Green river*. A mistake of the kind was by no means improbable, in the then wild and uninhabited state of the country on and about Green river, when it was dangerous on account of the Indians to attempt to set a compass. That such mistakes were general is evident from the names of places which were given. Thus the *west fork*, is in fact a north-east fork;

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what is called the east side of Panther creek, is truly the south-west side. The entry of April, was in substance, the location of the tract surveyed; and the memorandum of Mafon in October, was only fixing with more accuracy what was before in some degree vague. If this was the fact, then the entry of October was not a re-location of the warrant; it was never removed, but was always fixed to one and the same spot of earth. If then the entry of October is nothing more than it purports to be, viz. an explanation of the name of a place which was before uncertain, this same act of explanation which rendered certain the location of warrant No. 1, must of necessity also render certain the location of No. 2, which depends, for its beginning, upon the location of No. 1. *Id certum est quod certum reddi potest.* The two locations are dependent upon and connected with each other; and the explanation of the first must also explain the second. It is evident that it was Mafon's intention that the two tracts should lie along side of each other, and the rendering certain the first, upon which the second was dependent, could never be considered as withdrawing the one from the other, and placing them many miles asunder. If it was Mafon's intention in October to make a new location why did he not avow it? No person had applied to appropriate the land he wanted. No one had interfered, or was about interfering to take up that tract. There was nothing to prevent him from expressly withdrawing the entry of April, and making an entire new location. But his object was not to remove the location which he had actually made, but only more fully to explain the ideas which he had at first intended to express, but which on account of the inaccurate knowledge of the names of places and of the real geography of the country, he had failed to do. Taking then the entry of October as an explanation only, it applies as well to fix the true location of warrant No. 2, as of No. 1; and the survey of No. 2, is as correspondent to its entry, as that of No. 1, is to its entry.

Nothing can more clearly prove Mafon's intention to be to explain, and not to remove his entries of April, 1780, than his omitting to say any thing respecting his former entry of 8,300 acres, at the time he was explaining the entry of 8,400. Because having no idea that his act

would be construed to be any thing more than an explanation, it must apply as well to the former as to the latter. But if his intention had been to remove the location of warrant No. 1, he would either have expressly removed No. 2, at the same time, or else would not have ordered the *survey* of No. 2, to be made contiguous to that of No. 1. He might as easily have explained No. 2, as No. 1.

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Words are but the representatives, and not always the true representatives, of ideas. They do not always express, nor are they the uncontrollable evidence of the ideas of the person using them. They may be explained by the tone of the voice, by the emphasis, by the gestures, or by the actions of the person speaking. To determine, at a subsequent period of time, the nature of the act from the words used, and not to suffer the words to be explained by other proof of the nature of the act, is not a fair mode of seeking for truth.

The question is, what particular spot did Mason mean to locate by his entry of April? He has himself answered the question by his explanation in October. The only doubt can be whether he spoke the truth. He certainly had no motive for deception. There were then no contending claims. No other person had attempted to locate the land which he wished to appropriate. He had no reason to wish to preserve the priority of his entries, because the book of entries was open before him and he could see that no person had entered for the same land; a new entry therefore in October would have been as good as his old entry in April.

The act of assembly says that the warrant "*shall be good and valid until executed by actual survey.*" The survey then, and not the entry is the *execution* of the warrant. The warrant merges in the survey. This shews that the legislature attached greater importance to the survey, than to the entry.

If then the land surveyed, is the same land which Mason fixed his eye upon, but inaccurately described in April, then the survey was correctly made and pursuant to the actual location.

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2d: But admitting, for the sake of argument, that the survey did not correspond with the entry, yet Mason having paid the money for the land, and surveyed it, he was, as to the commonwealth, a bona fide purchaser, for a valuable consideration and entitled to a grant of the land. The commonwealth could not refuse, because the want of an entry was no injury to her. Mason had his choice among all the waste and unappropriated land in the state. It was of no importance to the commonwealth, whether he took this tract or another. The commonwealth sold all her land at the same price. The land was waste and unappropriated, and the warrant being executed by actual survey was spent and gone, *functus officio*. The commonwealth had no means to prevent the emanation of a grant. As between the commonwealth, therefore, and Mason, this was a contract, for that specific tract of land. It was as if the warrant had been special, for that particular land. The warrant, having been originally general, became special, as against the commonwealth, by the survey. The land ceased to be waste and unappropriated, as to the commonwealth, who was bound by the survey and could not sell it to another.

3d. This being the case, and Wilson having a full knowledge of all these facts before he made his entry, became a mala fide purchaser. This is one of the grounds upon which judge Innes decided the case; (here the opinion of judge Innes was read, with the authorities there cited.) As a second purchaser with notice, he could take only the right which the commonwealth had, subject to the contract with Mason.

The preamble of a statute is said to be a key to unlock its meaning. It appears by the preamble of the act of 1779, to have been the object of the legislature, 1st to encourage migration, and to promote population; 2d to increase the revenue.

To induce persons to become purchasers it became necessary to secure their titles, and for this purpose, as the situation of the country would not permit them in all cases to make actual surveys, an entry, or location of the land entered in the surveyor's books, was to be considered as equivalent to a survey, for the purpose of appropri-



ating the land, and securing a title. A survey, returned and recorded, is, in itself, a more unequivocal act of appropriation than an entry, and the law has made it the only means of executing the warrant. No time is fixed by law for the making the survey, because in many parts of the state it was at that time impossible to make it, on account of Indians, and no time could be ascertained with any degree of precision when it would become possible. For the security of subsequent purchasers, it also became necessary that some means of notice should be prescribed, that they might avoid an interference with prior rights. Hence it was enacted that the locations of warrants should be entered in a book, and should be so special that others might be enabled, with certainty to locate other warrants on the adjacent residuum. The objects of the commonwealth in requiring *entries* was not to secure her own immediate interest, but that of purchasers, by giving them notice: and if the subsequent purchaser acquires such notice, it is of no importance whether it be by an entry which was liable to be changed, or by an actual survey recorded, which was a complete execution of the warrant and could not be altered. Indeed the latter seems to be the more complete and effectual notice, and to answer the intention of the legislature better than notice by an entry only.

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The other object of the legislature was to raise money. If then complete notice of the location was given to the subsequent purchaser, and the money paid to the commonwealth, the two objects of the legislature were fully answered, and neither the commonwealth nor that subsequent purchaser had any right to complain. No injury was done to either. The person who with full notice of these facts, insists upon becoming a second purchaser, becomes such in his own wrong, and if a loss must fall upon either, it must light upon him, who thus voluntarily put himself in danger. Where the object of a statutory provision is only to give notice, if notice is had by other means, it has the same effect as if given in the mode required by the statute. Such have been the uniform decisions in England on the statutes of inrollment, and so well established is the doctrine that it can not be necessary to cite authorities to support it. Although where a new right is given by statutes, a strict compliance with the

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provisions of the statute is necessary, yet it is not necessary for every purpose. *Blackwell v. Harper*, 2 *Atk.* 94, 95. Mrs. Blackwell having designed and engraved certain drawings of plants, but omitted to engrave on the plate the day of their first publication, as required by the statute, lord chancellor Hardwicke decreed a perpetual injunction against Harper, notwithstanding that omission; but did not decree an account of the profits.

It will not be forgotten that Handley, a deputy surveyor of the county, was the partner of Wilson in this business, and was the person who actually made the entry, and that he fraudulently took advantage of the knowledge of Mason's surveys, which he acquired by means of his official situation, contrary to the express provisions and spirit of the act of assembly of 1779, which enacts, that "for preventing hasty and surreptitious grants and avoiding controversies and expensive law suits, no surveyor shall at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land by him surveyed, except only to the person for whom the same was surveyed." This clause of the act was made for the very purpose of preventing others from taking that advantage of surveys which the deputy surveyor himself has here taken; the law not contemplating the case of a surveyor so regardless of his duty and of his oath as to be guilty of an act like this. A title thus founded in fraud can never be supported. Upon a caveat the court is to exercise a chancery jurisdiction. The act says "the court shall proceed to determine *the right of the cause in a summary way.*" This they cannot do without chancery powers. The court in Kentucky has so construed the act, *M. S. S. reports*, p. 60, *Isaacs v. Willis*, and also in page 224.

If Wilson, by pursuing the strict letter of the law, has acquired any thing like a *legal* right, the court, as a court of chancery, will consider those circumstances of fraud which go to invalidate his right in equity.

4th. Wilson is not, under the provisions of the law, entitled to a caveat in this case.

The proceeding by caveat is in derogation of the common law, and therefore the act which authorizes it is to

be construed strictly. The act mentions only four cases in which a caveat may be entered. 1st. If the plat and certificate of survey be not returned into the land office within twelve months after the survey made, it shall be lawful for any other person to enter a caveat. 2d. If the breadth of the plat be not one third of its length. 3d. If any person shall obtain a survey of lands to which another hath, by law, a better right. 4th. When upon a caveat judgment shall be given for the defendant and he shall not lodge a copy of that judgment in the land office within three months thereafter. In the 1st, 2d and 4th cases the caveat is allowed for the purpose of protecting the rights of the commonwealth; they do not apply to the present question. In the 3d case the caveat is given as a remedy to him who hath by law a better right, and it is upon this ground that Wilson claims the process.

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If we examine the words of the law according to their grammatical construction, or compare them with the spirit and object of the law, we shall find that the better right which can support a caveat, must be a right existing at the time of the survey obtained, and not a right arising afterwards. The words of the act are "if any person shall obtain a survey of lands to which another hath by law a better right." The word *hath* is in the present tense, and must apply either to the time of passing the law, or to the time of committing the injury which is the cause of the caveat. It could not apply to the time of passing the act, because at that time there existed no rights to those waste and unappropriated lands which were the subject of that act. The *better right* then, was a right to be derived under that law. The injury to be remedied by the caveat was the injury done by a survey of lands to which another should have a better right. But a survey of lands, to which no other person had a right, can not be an injury to any one, and can be no ground for a caveat. As to Wilson's being in the situation of one *certain de damno evitando*, the assertion can not possibly be deemed correct. If he is in danger of loss, he has knowingly put himself in danger; he has sought the position he is in, with a full foreknowledge of all its evils. He was under no necessity of interfering with Mason's claims. His warrant was general. The wilderness was before him, and he knew where Mason had surveyed his land,

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The same lord Kaim; who says, "no man is conscious of a wrong when he takes advantage of an error committed by another, to save himself from loss," says also in the same breath, "but *in lucro captando*, the moral sense teaches a different lesson. Every one is conscious of wrong when an error is laid hold of to make gain by it. The consciousness of injustice, when such advantage is taken, is indeed inferior in degree, but the same in kind with the injustice of robbing an innocent person of his goods or his reputation." Here Wilson evidently had an intention of making gain by the error of Mason; and if by that means he has put his purchase money at risk, it is not for a court of law or of equity to be anxious to assist him. Wilson, finding that Mason had an advantage by the priority of his location, contrived (by the assistance of Handley, his fraudulent coadjutor) a plan by which he hoped to reap the fruits of Mason's industry; and now he would fain make the court believe he was an innocent purchaser, striving to avoid a loss, the danger of which he had incurred by pure misadventure.

Upon the whole then, Mason having obtained a right to this tract of land against the commonwealth, and Wilson having notice of that right, before he purchased, has no claim at all; but if he had, his remedy is not by caveat.

*Jones, on the same side.*

This cause naturally divides itself into two questions.

1st. Whether Mason has acquired a right to the patent.

2d. If Mason has not, whether Wilson has; for if neither has a right, Wilson can recover nothing.

The entry of Mason in April, 1780, is supposed to be so absolutely binding upon him, that he could not alter it without withdrawing it entirely, notwithstanding that he subsequently said he was mistaken in supposing the land to lie above the west fork, when in fact it was below. A man may go upon the land and fix in his mind a certain tract, but when he goes to the surveyor's office he may mistake its situation, and say it is on the east when it lies on the west, or the north when it lies on the south; but

when he discovers his mistake, an explanation is no evidence that his choice has been altered. Here is no proof of an intention to withdraw his first entry; or to appropriate a different tract of land from that which he first intended. The only evidence which can be drawn from the entry of October is, that he had been mistaken as to the point of compass, and as to the name of a particular fork of Panther creek. The land which he had chosen lies above a branch of Panther creek which he supposed to be called the West Fork, but which is not now known by that name. Mason was one of the first, if not the very first adventurer in the lands on Panther creek. There is no evidence that particular branches of that creek had names given them before he made his entries in April. He had as good a right to give names to places as any one else.

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But a survey itself is as good a location as an entry. Indeed it is better, because it is an actual location and occupation of the land. The lines are not merely described by words which are uncertain, but are marked out upon the land itself. It is a *pedis possessio*, an actual seizen. A survey differs from an entry as a diagram differs from a problem; or a proposition from its demonstration. If notice is the object of the statute, a survey recorded is better than an entry, as it is more definite and certain. If the object is to give evidence of an appropriation, it is better than an entry in the surveyor's book, because it is an act in pais, an actual possession. The one is but the command to locate, the other is the location itself.

In this case entry does not conflict with entry, and survey with survey; but a prior survey and occupation, with a subsequent entry.

A strong difference is made by the act of assembly between a survey and an entry. The first is a satisfaction of the warrant; and various clauses of different acts speak of a survey as the *execution* of the warrant. But the entry does not affect the warrant, which is declared to be "*always good and valid until executed by actual survey.*" The entry therefore is but an intermediate process by which the party gains a priority of right; it is intended merely as a substitute for a survey, until an "*actual survey*" can be

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made. If, therefore, there had been no entry at all, yet Mason's right is equally good as if his entry had been free from question. He has done the principal act itself, for which an entry is only a temporary substitute. Perhaps he ran some risk before his survey was obtained; but when a survey is completed the warrant and the entry are no longer of any effect or validity; they merge in the survey as the survey does in the patent.

2d. With respect to the plaintiff's right, it seems clear that it must be a right existing at the time of the survey.

If we were disseizers, as it is contended, then we gained a defeasible inheritance. We had possession, and whether legal or not, is of no consequence, it was a better right than Wilson's, and good against all the world but the lawful owner.

The acquisition of a legal title takes away the remedy by caveat. The warrant, entry and survey, constitute only an incipient equitable title, to be completed by the patent, which a caveat is the proper process to arrest. This being then entirely a contest about equitable rights, the process by caveat must be an equitable remedy, and gives the court an equity jurisdiction.

If this caveat had not prevented, there is no doubt that Mason, having obtained and returned his survey in due time, would have had a patent as a matter of course.

Suppose the commonwealth had attempted, like any other vendor, to defeat the claim of Mason, would not a court of chancery have compelled a conveyance? Every thing had been done by Mason which the commonwealth had a right to require; as against her therefore there must have been a decree. If so, then this court, exercising the same chancery powers with the court below, will give the same judgment which that court has rightfully given, in deciding that a contract existed between Mason and the commonwealth which a court of chancery would have carried into effect; and that Wilson having a full knowledge of that existing contract, became a subsequent purchaser; and, therefore, as to Mason he was a purchaser *malâ fide*, and can never defeat the right of Mason.

*Daveiss, in reply.*

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Can lands be appropriated in more ways than one? If it is decided that the mode of appropriation is *unique*, then there can be no tantamount act: The one mode pointed out by the statute must be pursued. In attempting to come at the true construction of the land law of 1779, it is highly important to take into consideration the act which immediately precedes it, for the settling of certain then existing claims and rights. They may indeed be called twin acts, being passed on the same day, and referring to each other. The preamble of the first act recognizes the great variety of claims, and the evils resulting from various modes of gaining a title to lands; to remedy which it declares it to be necessary "*that some certain rule should be established*," &c. The legislature, after settling existing claims, go on to provide a mode of acquiring titles in future, and to fix certain rules which should be observed by all future purchasers of public lands. The great evil intended to be remedied, was the existence of multifarious modes of acquiring titles. To give the act its proper remedial effect, it must be construed strictly; otherwise the evil would continue to be as great as ever. For if you once decide that titles may be acquired in any other mode than that pointed out by the statute, you open again that door to perplexity and ambiguity which the legislature intended to close forever.

It may not be improper here to remark, that no objection has been raised to the *intrinsic* merits of Wilson's claim. All the objections arise from its relation to Mason's. Wilson, therefore, has an intrinsic legal claim, which nothing can defeat but a *prior* appropriation of the land. This brings us again to the great questions, *what is a legal act of appropriation?* and *what lands can be called waste and unappropriated?*

To ascertain the meaning of these expressions it is not necessary to consult a glossary. The manner in which the legislature has used them on various occasions will leave no doubt upon the subject. Sometimes they call land waste and unappropriated after it has been settled, and sometimes even after it has been cleared and cultivated; and lands once legally appropriated by legal entry, may

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again become waste and unappropriated by the purchaser's not following exactly the provisions of the law. Hence it is apparent that when the legislature use the terms waste and unappropriated land, they mean lands not appropriated in the manner prescribed by law.

We are then to enquire whether, at the time of Wilson's entry, the land was such waste and unappropriated land, as, by the act of assembly, Wilson had a right to appropriate.

We contend that an entry is assential, and that Mason never entered for the land in dispute. The entry called for by the survey is the entry of April, 1780. That is clearly an entry for other land. It is a certain and a special entry. Its beginning is certain, and is above the west fork. The survey is some miles below the west fork. But we are told the name of west fork is uncertain. That the fork so called is not a west fork, but a north-east fork. But a name is different from a description. The name is arbitrary, and as long as a thing is known by a particular name, it is of no importance what that name is.

But ignorance of the country and the danger of acquiring accurate knowledge of it, are alleged both as a proof of, and an apology for the vagueness of the entry. If evidence and excuses of this kind are to be allowed, they will totally defeat the provisions of the law. It will let in those loose and vague claims which it was the object of the legislature to prevent. It is begging the question to argue that Mason was under a mistake because he chose to alter his entry; and that what was originally in itself certain, was uncertain, because Mason by a subsequent act chose so to consider it. But there was a reason why Mason should wish to give it the appearance of a mistake rather than of a removal of his entry. If he had expressly withdrawn his former entry, he would have lost his priority; and to save himself the trouble of examining all the intermediate entries, as well as the risk of omitting any of them, he chose to hold up the idea of correcting a mistake.

The entry of April then, being sufficiently certain, the warrant attached itself to it, and the warrant and



entry taken together had the same effect as a special warrant describing that identical tract of land. If Mafon had bought, or could buy a special warrant stating descriptively the land, he could have no other land than that described in his warrant. When he bought his general warrant he had the power of fixing its location at his election; having made his election, the power is expended, and the location fixed.\*

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But it is contended, that if the entry for 8,400 acres was removed, the entry for 8,300 was removed also; that the one is dependent on the other. This we deny. How is it dependent? Can not one exist without the other? Or is it because both were made by one person? Suppose the entry of warrant No. 2. had begun at a mile distance due north from the upper corner of entry No. 1. Would the removal of No. 1. be a removal of No. 2?

The description of the beginning of No. 2. was only a description of a certain place, as was that also of No. 1. and his removal of the location of warrant No. 1. did not alter that place. Suppose you make an entry, the beginning of which is a certain natural boundary. I make an entry beginning at the north corner of yours. You afterwards remove your entry. Does mine follow yours whether I will or not? Again, it is said that No. 2. could not be surveyed without surveying No. 1. But this can make no difference, it might make some additional trouble, but creates no impossibility. The lines of No. 1. may be run so as to ascertain the beginning of No. 2.

It is said that a survey is as good an act of appropriation as an entry, and equally answers all the objects of the statute. This might be a good argument, if the court could make laws; but the law does not so consider it. It limits no time in which the survey shall be made. The survey, therefore, can not be considered as the act of appropriation. By the old land law, indeed, a survey

\* *Washington, Justice.* Do you deny the right of removing an entry?

*Daveiss.* If it were *res integra*, I should. But the whole landed property of Kentucky would be shaken by such a judgment. I admit, therefore, that an entry may be removed; but Mafon, as we contend, has not removed his entry of 8,300 acres.

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was the substantial appropriating act; but the last clause of the land law, p. 98, has altered it in this respect.

It is contended also, that a survey is better notice than an entry.

When a law only *modifies* certain existing rights, it is to be considered according to the rules of equity; but when a man claims under a law giving a right *which did not exist before*, he must bring his case strictly within the law. 4 *Bac. ab.* 656, 12 *Mod.* 540, *Birch v. Bellamy*. *Viner, tit. statute* 506, 507.

Notice was not the only object of the law in prescribing an entry. The greater object was to avoid confusion in the sale of lands, and perplexity in the titles, which would have a bad effect upon the sale, and to establish an uniform mode of appropriating lands and locating warrants. The argument that a survey is better notice than an entry goes to prove that an entry is unnecessary. The surveyor is the agent of the commonwealth with limited powers, which must be strictly pursued, or his acts are void. He is by law directed to proceed in a particular manner, and must not deviate. A special power given by statute must be strictly pursued, 1 *Bur.* 450, *Rex v. Loxdale*. The surveyor must pursue the entry, and a survey not corresponding with the entry is void. The statute has made an entry necessary. In a statute creating a new law, affirmative words imply a negative. Appropriation means a *legal* appropriation. The book of surveys could not be intended to give notice, because it is by law shut up for twelve months from every eye but that of the surveyor and his employer. The survey itself could not be notice, because at any time within three months it is alterable by the party, or by the surveyor, and until the end of the three months it does not bind even the party himself, or the surveyor, and for twelve months afterward it is by law kept secret.

The law being affirmative that you shall give one kind of notice, implies the negative that no other notice shall be sufficient. The survey in itself was wrong, illegal and void. An act in itself wrong can never be the foundation of right. Land law, p. 90, and *Talbot v. Seeman*, this day decided.

But in the whole course of decisions in Kentucky a survey has never been considered as giving a right. The adjudications for eighteen years do not shew the date of a survey to be material as to notice, nor has it ever been so considered. There has never been a title supported upon a survey without an entry since the year 1779. To overthrow this course of decisions would shake the titles of half the land in Kentucky. Arguments drawn from the inconvenience of unsettling titles to real estate have always been respected. If it is an error, yet where "it is established and has taken root, upon which any rule of property depends, it ought to be adhered to by the judges, till the legislature think proper to alter it, lest the new determination should have a retrospect, and shake many questions already settled." 1 *Bl. Rep.* 264, *Robinson v. Bland*. 2 *Bl. Rep.* 696, *Rice v. Shute*. 1 *P. Williams* 223 *Regina v. Ballivos and Burgenfis de Bewdley*. In 1 *P. Williams*, 399, *Goodright v. Wright*. The court said "that the altering settled rules concerning property is the most dangerous way of removing land marks." The same doctrine is held in 2 *P. Will.* 2 *Dawes v. Ferres*, and in *Wagstaff v. Wagstaff*, 2 *P. Will.* 259.

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The survey could be no notice to Wilson because it was alterable, he knew it ought to be altered, and he might well suppose it *would* be altered. The book of surveys is no record, and is not of more authority than the book of entries, which is the only book to be resorted to, to know what lands have been appropriated.

But if the survey was notice, it was notice only of an illegal act. Notice can not make that lawful which was unlawful in itself, nor that unlawful which was in itself lawful. 4 *Term Rep.* 639, *Farr v. Newman*.

The court took time till this term to consider, and now the chief justice delivered the following opinion:

*Opinion of the Court.*

THIS is a writ of error to a judgment of the court of the United States for the district of Kentucky, rendered on a caveat, and is governed by the land laws of Virginia.

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In the year 1779 the legislature of that commonwealth opened a land office and offered for sale, with some reservations, so much of that tract of country lying within its boundaries south-east of the river Ohio as was then unappropriated: a part of which now constitutes the state of Kentucky.

Every person who would pay at the rate of forty pounds for one hundred acres into the treasury of the state, became entitled to such quantity of waste and unappropriated land as was, at that rate, equivalent to the money paid, for which a certificate was given to the register of the land office, whose duty it was on receipt thereof, to issue a warrant for the quantity of land purchased, authorizing any surveyor, qualified according to law, to lay off and survey the same. A warrant might also be issued on certain other rights.

A chief surveyor was appointed for each county, whose duty it was to nominate a sufficient number of deputies for the business of his county, and the law proceeded to direct that "every person, having a land warrant founded "on any of the before mentioned rights, and being desirous of locating the same on any particular waste and "unappropriated lands, shall lodge such warrant with "the chief surveyor of the county wherein the said lands "or the greater part of them lie, who shall give a receipt "for the same if required. The party shall direct the "location thereof so specially and precisely as that others "may be enabled with certainty to locate other warrants "on the adjacent residuum; which location shall bear "date on the day on which it shall be made, and shall be "entered by the surveyor in a book to be kept for that "purpose, in which there shall be left no blank leaves or "spaces between the different entries."

George Mason was one of the earliest purchasers under this law.

On the 29th of April, 1780, he made the following entries:

"1780, 29th April, George Mason enters 8,400 acres "of land to begin on Panther creek on the east side

"thereof, opposite to a beech on the west side about four miles above the mouth of the west fork, and to run up and down the said creek and eastwardly for quantity."

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"1780, April 29th, George Mason enters 8,300 acres, to begin at the upper corner of his 8,400 acre entry, and to run up the creek on the east side and back for quantity."

Panther creek pursues a general westwardly course from its source till it empties into Green river.

The creek forks something more than twelve miles and one quarter of a mile in a straight line above its mouth; and one of those forks, the direction of which towards its source is northwardly, has, from the beginning of the year 1780, been generally termed the west fork, and the other has been termed Panther creek.

On the 27th of October 1780, Mr. Mason made the following entry with the same surveyor:

"1780, October the 27th, George Mason desires to make his entry of 8,400 acres, more special on Panther creek, viz. to begin four miles above the forks of Panther creek where it mouths into Green river on the east side running up and back for quantity."

In the months of September and October, 1783, these two entries of 8,400 and 8,300 acres were surveyed by James Hord, one of the deputy surveyors of the county of Jefferson, which surveys, as was the custom, were made conformably to the instructions given by Mr. Mason's agent

The survey of the entry of 8,400 acres is supposed to conform to the explanation or amendment of that entry made in October, 1780. It begins four miles above the mouth of Panther creek and something more than eight miles below its forks.

The survey of the 8,300 acre entry adjoins the survey of 8,400 acres on the upper side; and the plat was shown by the surveyor before he would return it to the then agent

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of Mr. Mason, who, after its supposed variance from the entry was suggested to him, approved it and directed it to be returned to the office.

These surveys were returned in the course of the fall, 1783.

The supposed variance between the survey and location of the 8,300 acres was afterwards, about the 12th of September, 1784, pointed out by the surveyor to a subsequent agent of Mr. Mason, who also approved of the manner in which the surveys were made, and returned them to the land office.

On the 9th of April, 1783, George Wilson enters with the surveyor of Jefferson county 40,926 acres of land on Panther creek, so as entirely to include George Mason's survey of 8,300 acres.

This entry, though in the name of George Wilson, was made by John Handley, a deputy surveyor for Jefferson county, for his own benefit and that of Christopher Greenup, as well as for the benefit of George Wilson, and at the time of making the entry, full knowledge of the previous survey made of the same land for George Mason, had been obtained by the said Handley, who had seen the surveys in the office and had communicated this information to his two partners in the entry.

In the month of March, 1784, George Wilson entered in the supreme court of the district of Kentucky a caveat to prevent a grant from issuing on George Mason's survey of 8,300 acres, because the survey was made contrary to location, and because the entry was vague, he claiming the same, or so much thereof as interferes with his entry made on treasury warrants for 40,926 acres on the 9th of April, 1784.

Pending the caveat George Mason departed this life, and the suit was revived against Richard Mason, devisee of the said George, at whose petition it was removed into the court of the United States, held for the district of Kentucky.

A cross caveat was entered in the same court on the part of Richard Mason, to prevent the issuing a patent to George Wilson, and these causes coming on to be heard, it was agreed that the judgment rendered in the caveat *Wilson v. Mason*, should be also entered in the case of *Mason v. Wilson*.

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In June term 1800, the opinion of the court for the district of Kentucky was given that the defendant Mason had the better right, and it was ordered that the caveat entered by Wilson should be dismissed.

To this judgment the plaintiff Wilson has obtained a writ of error, and the principal question now to be decided by this court is, which of the parties has the better right?

But before entering on the question it may be necessary to notice a preliminary point made by the counsel for the defendant in error. He contends that in a caveat the decision of the district court is final, and that the cause cannot be carried before a superior tribunal.

To maintain this proposition he relies on an act of the legislature of Virginia, making the judgments of the district courts of the state final in cases of caveat; and on the compact between Virginia and Kentucky, which stipulates that rights acquired under the commonwealth of Virginia shall be decided according to the then existing laws.

This argument would not appear to be well founded had Virginia and Kentucky even been for every purpose independent nations; because the compact must be considered as providing for the preservation of titles, not of the tribunals which should decide on those titles. But when their situation in regard to the United States is contemplated, the court cannot perceive how a doubt could have existed respecting this point. The constitution of the United States, to which the parties to this compact had assented, gave jurisdiction to the federal courts in controversies between citizens of different states. The same constitution vested in this court an appellate jurisdiction in all cases where original jurisdiction was given to the

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inferior courts, with only "such exceptions and under such regulations as the congress shall make." Congress, in pursuance to the constitution, has passed a law on the subject, in which the appellate jurisdiction of this court is described in general terms so as to comprehend this case, nor is there in that law any exception or regulation which would exclude the case of a caveat from its general provisions. If then the compact between Virginia and Kentucky was even susceptible of the construction contended for, that construction could only be maintained on the principle that the legislatures of any two states might, by agreement between themselves, annul the constitution of the United States.

The jurisdiction of the court being perfectly clear, it remains to enquire which of the parties has the better right.

The title of Mason being eldest is of course the best if it be not in itself defective.

In the caveat of the plaintiff in error two defects in the title of the defendant are assigned.

1st. That his entry is vague.

2dly. That he has surveyed contrary to his location.

The first was abandoned in argument, and does not appear to the court to have been maintainable.

The second shall now be considered.

To support the allegation that the survey has been made contrary to the location, the entry and the survey are produced.

The entry calls for a beginning on the upper corner of George Mason's entry of 8,400 acres. To ascertain this spot reference must be had to the entry called for. That is to begin on Panther creek, on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek and eastwardly for quantity.



The branch of Panther creek which was at the date of the entry generally denominated the west fork, is something more than twelve miles and one quarter of a mile above its mouth. The entry of 8,400 acres is to begin four miles above the west fork, and the land in controversy ought to be placed above that entry. Yet it is surveyed below the west fork.

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To obviate this difficulty the counsel for the defendant in error produces and relies upon the entry of October 27th, 1780.

That entry is in these words :

" George Mason desires to make his entry of 8,400 acres more special on Panther creek, viz. to begin four miles above the forks of Panther creek, where it mouths into Green river, on the east side, running up and back for quantity."

This entry is contended to be, not a removal, but an explanation of that which had been made on the 29th of April, 1780, and being merely an explanation, the survey of the land in controversy, beginning at the upper corner of the survey of the 8,400 acre tract, conforms to its original location, and is consequently free from the exception made to it.

If this position be true, the entry of the 27th of October, 1780, must describe the same land with that which is described, though with less certainty, by the entry of the 29th of April in the same year.

But the entry of the 29th of April, calls for a beginning four miles above the mouth of the west fork of Panther creek, which fork is more than twelve miles in a straight line above the mouth of the creek, and the subsequent entry begins four miles above the forks of Panther creek where it mouths into Green river. The west fork of Panther creek and the mouth of the same creek where it empties into the river are perfectly distinct and separate places and were so understood at the time this location was made.

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It is however contended that in the extensive wilderness offered for sale, accuracy of description was not to be expected, and the point of union between a creek and river might well be mistaken for the forks of a creek.

This would not be very probable in any case, but is totally inadmissible in this, because names of places which they were generally understood to possess have been used by the person locating for Mr. Mason, and as there are no other controlling boundaries referred to, they must be understood as designating the water courses which were commonly described by those names, and which any person inclined to locate the adjacent residuum, would necessarily suppose to have been referred to by them.

But if the location of October explains without removing that of April, then the original entry might without such explanation, have been there surveyed, and could not have been properly surveyed four miles above the west fork.

This would scarcely have been attempted.

Indeed the counsel for the appellee, in admitting that an entry made on the land in controversy, subsequent to Mason's entry, but before his survey, would have been good, seems to have disclosed an opinion that the original entry did not comprehend the land in question, and that not the entry, but the survey is to be relied on as the foundation of his title.

To the court it appears perfectly clear, that the entry of the 27th of October was a removal and not an explanation, of that of the 29th of April.

It has not been contended that the removal of the 8,400 acre entry has also removed that of 8,300 acres.

The title of Mason then if good, must be shewn to be so by establishing that a survey without an entry is a sufficient foundation for a title.

With a view to discover whether this question has been settled in Kentucky all the adjudications contained in the

book of reports furnished by the counsel for the plaintiff in error, have been examined. It is not perceived either that the question has been directly determined, or that any principles have been settled which govern it.

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This case then is of the first impression.

The act of the Virginia legislature must be expounded according to the opinion this court may entertain of its import, without deriving any aid from the decisions of the state tribunals.

In 1779, Virginia opened a land office for the sale of an extensive unsettled and almost unexplored country, the motives for which are stated in the preamble of the statute to have been, "to encourage the migration of foreigners, promote population, increase the annual revenue, and create a fund for discharging the public debt."

Any person whatever might become a purchaser of any portion of these lands by paying into the treasury of the commonwealth the purchase money required by law. By doing so he became intitled to a warrant authorizing any surveyor to lay off for him in one or more surveys the quantity of land purchased. It was apparently contemplated by the law that the number of purchasers would immediately become very considerable. The condition of these purchasers in this stage of the contract ought to be distinctly understood. They had acquired a right each to appropriate to himself so much of the vacant land belonging to the commonwealth as he had purchased, but no right either in common or severally, to the whole or any particular part of the country, until such right should be acquired by further measures.

This was at the same time the situation of a great number of persons, and a prior was in no respect more eligibly circumstanced than a subsequent purchaser, except in the single case of both applying precisely at the same time, for the purpose of appropriating each to himself the same land. Had the purchaser of the first warrant been negligent enough to hold it up until the whole land was appropriated, the title of every subsequent purchaser would have been good against him, and he would have been

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without remedy. The original purchase of a warrant then creating only a general claim which gave of itself only in a single case priority of right to the prior purchaser, it became indispensably necessary to prescribe a mode by which this general title should be satisfied by the appropriation of a particular tract of land.

This mode seems to have been prescribed by that part of the act which says that "every person having a land warrant and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the surveyor of the country wherein the lands or the greater part of them lie." "The party shall direct the location thereof so specially and precisely that others may be enabled *with certainty*, to locate other warrants on the adjacent residuum; which location shall bear date the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose."

This mode of appropriation pointed out by the law as that which must be used by any person desirous of locating a warrant on any particular waste and unappropriated land, requires that the location shall be given to the surveyor with the warrant, in order to be entered in a book kept for that purpose, which is denominated the book of entries.

It is apparent throughout the whole act that the legislature never contemplated a survey as being in itself an appropriation of land, or supposed that one would be ever made, if not founded on a previous entry.

Some few of the many passages which are found in various parts of the law will be selected to evince this position.

The surveyor is forbidden to admit the entry of any warrant on treasury rights, except pre-emption warrants, in his books before the first day of May next succeeding the passage of the act. But the prohibition does not extend to a survey, and yet this would have been equally necessary if land could have been appropriated by a survey without a previous location.

It is declared that no entry or location shall be admitted for certain lands which are described in the act and intended to be reserved: But there is no declaration that they shall not be surveyed. This omission manifests an opinion that they could not be appropriated by survey alone.

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In prescribing the duty of a surveyor the law enjoins him to proceed with all practicable dispatch to survey all lands entered in his office; and many rules are given to regulate the surveying of entries; but there is not a syllable in the act which contemplates or makes a single provision for surveys not founded on a prior entry made in the book of entries.

The mode of appropriation then which the law designates has not been pursued, but it is contended that another course has been adopted which equally produces all the objects designed to be effected by the location in the book of entries, and which therefore ought to be received as a sufficient substitute for an entry.

The legislature of Virginia, when bringing her lands into the market, had undoubtedly a right to prescribe the terms on which she would sell, and the mode to be pursued by purchasers for the purpose of particularising the general title acquired by obtaining a land warrant. The court is by no means satisfied of its power to substitute any equivalent act for that required by the law.

The case of Blackwell v. Harper, reported in 2. Atkyns, 93, has been cited to show the authority of a court to dispense with part of a statute directing the mode of proceeding to be observed by a person who claims title under such statute.

That case arose under an act of parliament which directs that "any person who shall invent, or design, engrave, &c. any historical or other print or prints, shall have the sole right and liberty of printing and re-printing the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints."

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The plaintiff had engraved certain medicinal plants, a work deemed within the act, and had brought a bill to establish her right to the sole property in them, and to restrain the defendant from copying and engraving them, upon the penalties within the act of parliament.

It was objected that the day of publication from which the term was to commence had not been engraved, and so the act had not been complied with and consequently the property had not vested.

Lord Hardwicke was of opinion that the property vested, although the day of publication was not engraved, and that the words directing the day of publication to be engraved on each print were only necessary to make the penalties incur, not to give the title.

“Here,” said his lordship, “the clause which vests the property is distinct.”

This opinion however was given with great doubt, and only an injunction was granted without costs and without an order for an account.

The case of *Blackwell v. Harper* has, at the bar, been denied to be law. However this may be, it is certainly essentially variant from that before the court.

The opinion of lord Hardwicke was not that where any circumstance was required by a statute in order to vest a title, other equivalent acts might be received as a substitute; but that the particular statute on which the case depended, did not require the omitted circumstance, since the property was vested by a distinct clause.

By a reference to the words themselves, it will be perceived that the expression of the act of parliament is such as might perhaps warrant this opinion. The property is completely vested before the direction concerning the date of the publication is given, and lord Hardwicke supposes it to be a question on which judges would differ whether the subsequent words were merely directory or descriptive. A perfect property in the specific thing was supposed by that judge to have been given by other words, and on that idea his decree is declared to have been formed.

But in the case under consideration no property in the specific thing is supposed to have been given by other words. No title to it is created by any other part of the act. The purchase of the land warrant gave a power to appropriate, but was no appropriation, and the mode pointed out by the legislature would seem to the court to be that, which can alone give title to the particular lands.

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But if this opinion should even be too strict, if an act entirely equivalent to an entry could be received as a substitute for one, a survey does not appear to be such an act, nor does it seem to have been so considered by the legislature.

From the circumstances under which the act for establishing the land office was passed, as well as from the expressions of that act, it is apparent that the entry was intended to give complete notice to other purchasers that the land located was already appropriated. The mode of giving this notice it was certainly proper to prescribe. By doing so, the numerous doubts and questions concerning the sufficiency of notice, which would inevitably arise from leaving that important fact to the discretion of individuals, in the first instance, and then to the discretion of courts to be exercised many years after all the lands should be located, would be in a considerable degree obviated.

It was doubtless an important object to obviate them.

The regulations therefore respecting entries are all calculated to make them as notorious as possible.—Not so of surveys.

The entries and surveys are to be kept in separate books. Why so if a survey amounted to an entry?

The entry must be dated when made by the locator; but the time of recording a survey may appear or not at the discretion of the surveyor, and a subsequent survey may be recorded before one of prior date.

There are to be no blanks in the book of entries, and this regulation is well calculated for the prevention of

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frauds in the origin of titles. It does not apply to the book of surveys.

The book of entries is open to the inspection of every person. The book of surveys cannot be looked into but at the discretion of the surveyor.

If a prior entry be alleged the person affected thereby has a right to demand a copy thereof; but no copy of a survey can be given to any other than the proprietor until twelve months after it shall have been made.

From the whole act a legislative intention to make an entry, and an entry only, the foundation of title to any particular tract of land is strongly to be inferred, and if even an equivalent act could be received, a survey does not appear to be such an act. In this particular case it is true that complete notice was obtained by it, but titles must rest on general principles, and in the general, a survey would not, without something more than the law requires, be notice. The law, therefore, can not contemplate a survey as of equal operation with an entry.

A question has been made at the bar, whether a caveat is in the nature of an equitable action, and on the supposition that it is of that nature, the counsel for the defendant in error has insisted that Wilson, having express notice of Mason's survey, was unable to acquire title to the land appropriated by that survey.

This would be true if the survey gave to Mason any title either in law or equity. But if a survey without an entry was no appropriation—if it gave no title—then notice of the survey could not create a title.

The doctrine of notice is well established. He who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other to the extent of his equity. But if he has no equity, then there is nothing for which the purchaser of the legal estate can be a trustee.

A point in the case still remains which appears more doubtful, and concerning which very considerable difficulties have been felt.



Although Mafon's survey may give him no title, it is questioned whether Wilfon can maintain a caveat against it.

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The caveat is a remedy given to prevent a patent from issuing in certain cases where the directions of the law have been violated to the injury of the commonwealth, or where some other person hath a better right. The case before the court is that of a better right. The terms in which this remedy is accorded to the person who would avail himself of it for the purpose of asserting his own title are, "or if any person shall obtain a survey of lands to which another hath by law a better right, the person having such better right may in like manner enter a caveat," &c.

Considerable doubts were entertained whether the word "*hath*," in the description of the character by whom a caveat might be maintained, did not absolutely require that the better right should exist at the time the survey should be obtained. This construction, to which some of the court were at first greatly inclined, would have involved considerable inconvenience, and would have defeated what is deemed the essential object for which the remedy was given.

It has been already stated to be the opinion of the court, that a survey not founded on an entry is a void act and constitutes no title whatever. Consequently the land so surveyed remains vacant and liable to be appropriated by any person holding a land warrant. It is difficult to conceive that a remedy designed to enable an individual who has made his entry in conformity with the law, to prevent another from obtaining a grant for the land he has entered, should be withheld from any person whose entry entitles him to the land he has located. It is not less difficult to impute to the legislature an intention to protect a survey to which the law denies all power of appropriating the land it comprehends, or an intention of carrying such survey into grant, while another has legally appropriated to himself the land thus to be granted. It would be difficult to state a case to which the principle, that a remedy should be so extended as to meet the mischief, would apply more forcibly than to this. If however the

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terms of the law had been explicit, those terms must have controlled the subject. But the expression of the act is not if any person shall obtain a survey to which another at the time such survey may be obtained shall have by law a better right, the person having such better right may enter a caveat, &c. The words of the law are not thus express. They are, if any person shall obtain a survey of land to which another *hath* by law a better right. The word *hath* in its most strict and rigid sense would refer neither to the time of making the survey, nor or of entering the caveat, but to the present moment when the word is used, and would require that the better right should exist at the time of the passage of the act. This construction would be universally rejected as absurd, and all would expect the court to understand the words more liberally, and to expound them so as to give some effect to the legislative will. Some latitude of construction then must be used, some words additional to those used by the legislature must be understood, and this being apparent, the court perceive no sufficient motive for extending the remedy to rights existing when the survey shall be made, and denying it to those which are equally valid and which exist when the caveat may be entered.

The caveat entered by Wilson is therefore maintainable under the land law of Virginia, since his title had accrued when it was entered.

The court is of opinion that the district court of Kentucky has erred in deciding that the defendant in error hath the better right, and that their judgment ought to be reversed and annulled. In pursuance of this opinion I am directed to deliver the following judgment.

*Judgment of the court.*

“Whereupon, it is considered by the court that the plaintiff Wilson hath by law the better right to the land in controversy, and that the judgment of the court of the United States for the district of Kentucky be reversed and annulled; and that the register of the land office in Kentucky do issue a grant to the said Wilson upon his survey of 30,000 acres of land registered in the said office, according to the metes and bounds thereof, and

" that the said plaintiff do also recover his costs expended  
" in this court and in the said district court, all which  
" is ordered to be certified to the said district court, and  
" the said register of the land office accordingly."

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*In the case of Mason v. Wilson*, the judgment of the court was, " that the defendant Wilson hath by law the better  
" right to the land in controversy, and that the judgment  
" of the court of the United States for the district of  
" Kentucky be reversed and annulled; and that the said  
" caveat be dismissed, and that the defendant Wilson reco-  
" ver his costs, &c."\*

## UNITED STATES v. SCHOONER PEGGY.

**F**RROR to the circuit court for the district of U. STATES,  
Connecticut, on a question of prize.

SCHOONER  
PEGGY.

The facts found and stated by judge Law, the district  
judge, were as follow :

" That the ship Trumbull, duly commissioned by the  
" President of the United States, with instructions to take  
" any armed French vessel or vessels sailing under autho-  
" rity, or pretence of authority from the French republic,  
" which shall be found within the jurisdictional limits of  
" the United States, *or elsewhere on the high seas*, &c. as set  
" forth in said instructions; and said ship did on the 24th  
" day of April last (April 1800) capture the schooner Peg-  
" gy, *after running her ashore* a few miles to the westward  
" of Port au Prince, within the dominions and territory of  
" *General Toussaint*, and has brought her into port as set  
" forth in the libel, and it further appears that all the facts,  
" contained in the claim, are true†; whereupon this court

A final condem-  
nation in an in-  
ferior court of  
admiralty,  
where a right  
of appeal exists  
and has been  
claimed, is not  
a definitive con-  
demnation  
within the  
meaning of the  
4th article of  
the convention  
with France,  
signed Sept. 30,  
1800.

The court is as  
much bound as  
the executive to  
take notice of a  
treaty, and will  
reverse the ori-  
ginal decree of  
condemnation  
(although it was

\* As to the necessity of giving notice in the form prescribed by law, vide  
*Evans's Essay on bills*, 67 68. 69 70. 71 —and 2 *H. Bl.* 609. *Nicholsen*  
v. *Gouthit*.

† The material facts stated in the claim are, that the schooner was the  
property of citizens of the French republic; that she was permitted by  
*Toussaint*